82-1000
No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY P. HALSELL
Petitioner,

vs.

KIMBERLY CLARK CORP.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. When a Plaintiff under the Age Discrimination in Employment Act establishes prima facie that he is in the protected group, was discharged while meeting his employer's legitimate expectations, and was replaced by a younger person, can the trial judge deny him finding of fact by the jury to which he is entitled under the Act?

If Court grants Certiorari Petitioner would brief additional questions as to whether error was committed by entering judgment n.o.v. and summary judgment.

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Petitioner, Henry P. Halsell, respectfully prays this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed on July 26, 1982, No. 81-1873.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 683 F.2d 285. The opinion of the District Court is reported in 518 F. Supp. 694. The opinion and judgments and the order denying petition for rehearing are included as appendices as is the Order of the District Judge granting partial summary judgment.

JURISDICTION

The opinion of the Court of Appeals was handed down July 26, 1982, and judgment was entered. A timely petition for rehearing and a suggestion for rehearing en banc was denied September 14, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

29 U.S.C., Sections 621-634, Age Discrimination in Employment Act, is reproduced in Appendix D.

STATEMENT OF THE CASE

The Factual Background

Petitioner, Halsell, was recruited by Respondent Kimberly Clark Corporation (KC) to be a Project Manager. He was hired by John R. Tinnel, President of Kimtech, a wholly owned subsidary of KC, for initial assignment to Mexico where he was to expand a pulp and paper mill for Kimberly Clark de Mexico (KCM), itself 43% owned by KC (Tr. 501, 502).

Halsell arrived in Mexico August 2, 1974, (Tr. 77) and remained at work there until he was discharged as of November 15, 1975, (Tr. 119) at which time he was 57 years old (Tr. 106).

This was a complex project (Tr. 28) and, while there were difficulties with all its aspects (Tr. 176), by September, 1975, the project was in good shape for it then appeared that it would be completed on time, within budget and with the desired production capacity (Tr. 110, 111, 167, 192).

On September 6, 1975, Tinnell gave Halsell a 10% "merit" pay increase effective August 1, 1975, and evaluated his performance during dinner in Mexico City (Tr. 107). He said that how well Halsell achieved project objectives would be the paramount [superior to all others] indication of his performance (Tr. 267). He said also that he presumed [belief based on probability] that Halsell wold achieve all project objectives on which his bonus was to be based and earn a sizeable bonus for his work (Tr. 108). He said further that Halsell's methods were atypical and their effectiveness determinable solely in terms of final project results (Tr. 109). He then gave him a "provisional" rating which Halsell assumed was a contingent rating pending completion of the project (Tr. 109).

Tinnell arrived at Halsell's office on November 13, 1975, fired him effective November 15, 1975, (Tr. 117, 118) and replaced him with Owen Gentry, who was about 36 years old (Tr. 110) and who had been employed about one month only (Tr. 235). Tinnell's stated reasons were that KCM had lost confidence in Halsell and that some of the U. S. based engineers did not like or care for him, he thought because he had not satisfied their emotional or ego needs (Tr. 119). Halsell thought that Tinnell's reasons were inadequate and probably untrue (Tr. 118). After exhausting other remedies he filed suit (Tr. 123).

The Proceedings In The Courts Below

This case includes the issues of libel, age discrimination in employment, and breach of employment contract. Suit was filed April 23, 1976. The District Court's jurisdiction was invoked under 28 U.S.C. Sec. 1332 because of diversity of citizenship, Halsell being a resident of Lake Village, AR, at the time and Kimberly Clark having its principal place of business in Neenah, WI.

The complaint was amended October 6, 1977, to add age discrimination and libel and to add Wayne Cheng as a defendant. Cheng was dismissed by Order of Chief District Judge Eisele dated March 15, 1978, for lack of in personam jurisdiction. The issue of libel was disposd of by District Judge Richard Arnold in his Order dated October 15, 1979, granting partial summary judgment while holding that there was no publication. The complaint was further amended November 21, 1980, with respect to damages.

The case was tried before a jury in July, 1981, in the Eastern District of Arkansas. At the end of Halsell's case in chief, which came after defense witness Tinnell testified out of turn, the Court directed a verdict in favor of Kimberly Clark on the issue of age discrimination for Halsell had not met the required proof (Tr. 351) but saying in its Memorandum Opinion that Plaintiff presented no proof on that claim. (A-24)

The contract issue was submitted to the jury which found that Kimberly Clark had breached its employment contract with Halsell and awarded him $250,000.00 in damages. The District Court then entered judgment notwithstanding the verdict for Kimberly Clark although its counsel did not renew his motion for a directed verdict at the close of all the evidence.

Halsell filed a timely appeal with the Eighth Circuit whose opinion, filed July 26, 1982, affirmed all actions in the court below. His request for rehearing was denied September 14, 1982.

The Eighth Circuit held on the libel issue that the defamatory memo was not published and on the age discrimination issue that Halsell did not prove that he was qualified and, if he did, Kimberly Clark so rebutted his case through cross examination of his witnesses that a jury could not reasonably have found age discrimination a factor in his discharge. (A-5,A-9-10, A-12-13)

The Court of Appeals excused Kimberly Clark's failure to renew its motion for a directed verdict at the close of all the evidence - a prerequisite for a 50(b) judgment - because it believed that the District court indicated that Kimberly Clark need not do so and because evidence subsequent to the motion did not relate to and affect the contract issue on which a directed verdict was sought. (A-18)

The Court of Appeals affirmed judgment n.o.v. holding that the facts presented at the trial established that Halsell was employed for an indefinite period of time and therefore his employment was terminable at will (A-21). The Appeals Court rejected Halsell's contradictory testimony as to duration (A-21) and did not respond to his contention that the agreement about his bonus opportunities made his employment terminable only for good cause which the jury found was lacking.

REASONS FOR GRANTING THE WRIT

I. To Direct A Verdict Against A Plaintiff Who Has Made Out A Prima Facie Case Under "The Age Discrimination In Employment Act" Is To Deny Him Jury Trial Guaranteed By The Seventh Amendment And By The Act.

Halsell's testimony that he was 57 years old when fired (Tr. 106) and was replaced by a man younger than 40 (Tr. 110) was not controverted.

Halsell's testimony as to his performance was that he predicted early September, 1975, (Tr. 151) that he would achieve all project objectives identified to him (Tr. 85). At that time Tinnell gave him a 10% "merit" pay increase and said that he presumed that Halsell would achieve all project objectives on which his bonus was to be based and would earn a sizeable bonus for his work (Tr. 107, 108). Tinnell said further that Halsell's methods were atypical and their effectiveness determinable only in terms of final project results (Tr. 109). He then gave him a "provisional" rating which Halsell understood was a contingent rating pending project completion.

Halsell's witness Hartwig, who was a U. S. based design engineer on the project, testified that he thought that Halsell's performance was "pretty good under the circumstances" (Tr. 288).

Halsell's witness Withrow, who was an assistant construction manager on the project, testified that whenever he had worked with Halsell he had a superior ability for organization and project work (Tr. 297) and that, after he arrived on the job in late October, 1975, he learned from schedules that had been published that the job was ahead of schedule and he learned from financial documents that the job was below budget. (Tr. 298)

This was Halsell's prima facie case, and it satisfies the most rigorous criteria known to this Petitioner. About his prima facie case the Appeals Court said:

> "Halsell's evidence on this issue consisted solely of his testimony that he had received a pay raise two months before his discharge and a performance rating of 'provisional'. We agree with the district court's determination that this evidence did not establish that Halsell was qualified for the job and, thus, did not raise an inference of age discrimination." (A-8,9)

Clearly, Halsell made out a prima facie case but was denied further proceeding by the application of an unrevealed standard as to sufficiency of the evidence to only a part of his proof. This was to deny him determination of facts by a jury in a manner not in accordance with common law, although a jury trial is guaranteed by the Seventh Amendment and the ADEA.

This Court has addressed discrimination in Title VII cases culminating in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981) but has not done so in age discrimination cases. Because of the growing number of such cases and the apparent inability of some circuits to follow this Court's analagous determinations in Title VII cases, it is important that this Court give guidance to insure uniformity while giving real meaning to the right to jury trial.

II. The Determinations Of The Eighth Circuit Conflict With This Court's Determinations In *Texas Department of Community Affairs* v. *Burdine.*

The Eighth Circuit said that "even assuming that Halsell presented a prima facie case of age discrimination, Kimberly Clark's rebuttal overwhelmingly established its legitimate, nondiscriminatory reasons for discharging Halsell" and "in this

case, Kimberly Clark presented substantial evidence through cross-examination of plaintiff's witnesses that it had legitimate, nondiscriminatory reasons for discharging Halsell." (A-10)

Halsell's witnesses were Hartwig, Roberge, Walker and Withrow, who were not cross-examined; Flynn, who was cross-examined but who did not testify about Halsell's performance; and Halsell, himself, who did so testify and who was cross-examined. Kimberly Clark did not elicit from Halsell testimony that there were any significant deficiencies in his performance as Petitioner will detail in his brief on the merits, if allowed.

The Appeal Court apparently and necessarily then relied on Tinnell's testimony in concluding that Kimberly Clark rebutted Halsell prima facie case. Assuming for purposes of argument that this is true, the case cannot be ended at this point by a directed verdict against the plaintiff. All that the defendant has done is to rebut the presumption against him resulting from the prima facie case and insulate himself from an adverse directed verdict for he has created an issue which can be resolved only by the jury.

The Eighth Circuit said: "Halsell argues, however, that the defendant's rebuttal evidence simply created a question of fact for the jury, but did not destroy the prima facie case. We do not agree. By satisfying its burden of production, Kimberly Clark eliminated any inference of discrimination raised by Halsell's prima facie case," Citing *Burdine.* (A-11)

The Court of Appeals has misconstrued *Burdine* which says at the place cited: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. 248, 255 and n 10 which reads:

> "In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextural. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."

The Eighth Circuit has failed to follow *Burdine* and it may be that other courts, encouraged by this, will similarly err. This Court can give guidance by considering this ADEA case in the light of its determination of Title VII cases and make it clear that plaintiff's prima facie case, when rebutted by defendant's explanation, creates an issue of fact for the jury, where jury trial is had.

In this case it is worth noting that on cross-examination Tinnell produced testimony confirming for the most part Halsell's testimony about his performance. (Tr 108, 109, 266, 267)

III. The Eighth Circuit's View Of This ADEA Case Renders The Act Virtually Unenforceable And Thwarts The Will Of Congress.

If we accept the views of the Eighth Circuit in this case, no plaintiff is likely to prevail when proceeding on the basis of disparate treatment.

Assuming that he makes out a prima facie case, the defendant will usually be able to articulate facially neutral reasons for his action. Directed verdict will then be granted for him by those courts which choose to follow this case.

This is made even more likely when one notes how the Eighth Circuit has relaxed the employer's burden in saying that "[i]n an ADEA case, the defendant employer need not persuade the court that the proferred reason in fact justified the discharge because the issue is not whether the reason articulated by the employer warranted the discharge, but whether the employer acted for a nondiscriminatory reason." (A-11)

If we accept this view, the employer need articulate only some reason unrelated to age; which reason may be fabricated, frivolous and unrelated to job performance or his legitimate expectations. Fear of this led the Fifth Circuit to wrongly state the employer's burden of proof in *Burdine, supra,* 257.

Nor can one take comfort in noting that this Court has said "we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext." (*Ibid* 258) This is because he will never get a chance to offer further proof; he will be out of court on a directed verdict.

It requires no research of legislative intent to conclude that Congress did not intend to enact a statute which is in large measure unenforceable.

The state of law in ADEA cases based on disparate treatment will suffer and great mischief result if this case is allowed to stand. This is a matter of great public interest affecting such a large number of litigants that this Court should review and correct the erroneous views of the courts below in this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 10th day of December, 1982.

BY _____
/s/ BILL R. HOLLOWAY
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Bill R. Holloway, Attorney for Plaintiff herein, do hereby certify that I have served a copy of the above and foregoing Petition for Writ of Certiorari upon the Honorable James M. McHaney, Owens, McHaney & Calhoun, 1902 First National Building, Little Rock, Arkansas, 72201, by regular United States Mail on this the 10th day of December, 1982.

/s/ BILL R. HOLLOWAY